IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.1.2002

CORAM:

THE HONOURABLE MR.JUSTICE K.GNANAPRAKASAM

SA.NO.874 OF 1990

1.Shanmugham
2.Kandasamy Gounder
3.Easwaran ..Appellants

Vs.

1.Rathinaswamy Gounder
2.Kumaraswamy Gounder
3.Nataraja Gounder
4.Chinnaswamy
5.Sivagami
6.Thangamani ..Respondents

For Appellants: Mr.V.Nicholas

For Respondents: Mr.V.Manohar R1

Appeal filed against the judgement and decree passed in AS.No.59 of 1989 dated 9.2.1990 on the file of the Subordinate Judge, Udumalpet, confirming the judgement and decree passed in OS.NO.415 of 1988 dated 29.4.1989 on the file of the District Munsif, Udumalpet, as stated therein.

: JUDGEMENT

1. The defendants 1, 2 and 4 are the appellants.

2. Brief facts are as follows:-

The plaintiff filed the suit for declaration of his right to take water from the new well from his land through the common channel and for permanent injunction. The plaintiff and the defendants 1 to7 are the descendants of a common ancestor and they owned joint family properties. Partition took place among the parties on 7.8.1938, in which, the plaintiff got lands in S.No.274/2 and 275/4 among other lands. Two wells in S.Nos.277 and 275 were kept in common and each branch had 1/8th share in these wells and also the right to take water through the common channel to irrigate their respective lands. The plaintiff has been making use of the common channel to irrigate his lands.

Likewise, the defendants were also making use of the common channel to irrigate their lands. The common wells were not properly maintained and it dried up also. Electricity connection was also cut off. Hence, the sharers have dug well separately in their own lands, but, have been making use of the common channel to take water and irrigate their respective lands as per the rights provided in the partition that took place in 1938.

3. The defendants in the written statement have admitted the right of the plaintiff to take water from the common wells through the common channel, but resisted the claim of the plaintiff to take water from the new well through the common channel.

4. The trial court accepted the case of the plaintiff and decreed the suit and the same was also confirmed by the lower appellate court. Aggrieved by the same, the defendants 1, 2 and 4 have preferred this second appeal.

5. The second appeal was admitted on the following substantial questions of law:-
i.Whether the courts below are correct in granting a decree to the plaintiff to take water from his private well through the common channel when a co-owner of a common channel cannot use it for the purpose of taking water from a well which does not belong in common to the owners of the common channel?
ii.Whether the courts below are correct in permitting the plaintiff to take water through the common channel from a newly dug up private well of the plaintiff?
iii.Whether the courts below are correct in allowing the plaintiff to use the common channel when such user would damage the cart-track in the lands of the defendants and thereby affect their rights?
Question Nos.(i) and (ii) are similar and overlapping.

6. Admittedly, the plaintiff and the defendants 1 to 7 claim their right through a common ancestor. The rights of the parties in the old wells, suit channel and the cart-track and thrashing floor are admitted and they are all kept common for the beneficial, use and enjoyment of all the parties concerned according to their respective shares. The fact that the water in the common wells dried up and all the parties concerned have dug up new well in their respective lands and have been taking water through the common channel is also not in dispute. The plaintiff's new well is also situated in the lands, which was allotted to the share of the plaintiff's branch in the partition, which took place in the year 1938. As such, the parties, who have got the right to take water to their respective lands, maintained coownership in the suit channel. As such, the

plaintiff is entitled to take water from the new well through the common channel. "Such use of the common channel, by no stretch of reason, can be said to interfere with the right of the plaintiff in any way. Nor can it be said that the said user of the channel by the plaintiffs would, in any way, damage or weaken the channel. Unless the defendants prove that such use by the plaintiffs in any way interferes with their rights or that the common channel is being or is likely to be damaged or injured or weakened they cannot prevent the plaintiffs from making use of the common channel during their turn of taking water through the common channel. Taking water from their exclusive well, which is most advantageous and beneficial for the plaintiff and the same cannot be obstructed by the defendants." The above said view of mine derives support from the case of SUBBIAH GOUNDEN VS. RAMASWAMY GOUNDEN (AIR-1973MADRAS-42-(AT P.45)). In fact the said decision was cited before the Supreme Court in the case of Ayyasamy Gounder and others, Appellants Vs. Munusamy Gounder and others, Respondents (AIR-1984-SC1789):(1984TLNJ-SC-10) and the apex court accepted the view of the High Court and stated that "The defendants indeed are adopting a 'dog in the manger' policy. Although they do not stand to be prejudiced or put to any detriment on their own pleadings, they seek to prevent the plaintiffs from irrigating their lands through the common channel from their exclusive well. There is no other source of irrigation for the plaintiffs." It was further observed in para 16 that "There is yet another reason why we would be reluctant to encourage the defendants to stop the plaintiffs from irrigating their fields from their own exclusive well through the common channel. In these days of scarcity when every effort is being made at all levels to increase the agricultural production to feed the country's teeming millions it would not be desirable to allow the defendants to create any hurdle in the irrigation of the plaintiffs' plots through the common channel from their exclusive well. Thus, neither the law nor expediency warrants a conclusion as desired by the defendants." Thus the law has been clearly laid by the Supreme Court.

7. The ruling of the Apex Court cited supra is squarely applicable to the case on hand and therefore, I am not persuaded to accept the case of the defendants, in preventing the plaintiff from making use of the common channel to irrigate his lands from his new private well, as it would hamper plaintiff's agricultural operations, in turn, it would reduce the agricultural production of the plaintiffs. As such, I am in complete agreement with the views taken by the courts below, that the plaintiff is entitled to have a declaration that he is entitled to take water from his new private well through the common channel to his

SRCM
K.GNANAPRAKASAM, J.

lands and the same cannot be prevented by the defendants. The questions raised are answered in favour of the plaintiffs.

8. In the result, the second appeal is dismissed. No costs.

23.1.2002
Index: Yes/No
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Assistant Registrar

//True Copy//

Sub Assistant Registrar

To:

1.The Subordinate Judge, Udumalpet
2.The District Munsif, Udumalpet

SA.NO.874 OF 1990

?IN THE HIGH COURT OF JUDICATURE AT MADRAS

% Dated: 7-2-2002

* CORAM:

THE HONOURABLE MR.JUSTICE A.K. RAJAN

+ W.P.No. 16778 of 1994

#B. Thulasiraman .. Petitioner

vs.

$1. The District Educational
Officer, Vellore,
N.A. District

$2. The Executive Officer,
T.T. Devasthanam,

Tirupathi (Edn.).

$3. P.Harikesavan,
Assistant Head Master,
Sri Venkateswara Higher
Secondary School, Vellore.

$4. The Joint Director of
School Education (Higher Secondary),
College Road,
Chennai-600006.
(R3 and R.4 were impleaded by orders
of this Court dated 10.2.1997 and
17.8.2001 respectively). .. Respondents

Petition filed under Article 226 of the Constitution of India, for the issuance of the writ of certiorarified mandamus, as stated therein.

! For Petitioner : Mr.K. Chandru,
Senior Counsel
for Miss. K.Suguna.

^ For Respondents : Mr. R.Rajasekaran,
for R.1.

^ Mr. K.Venkateswara Rao,
for R.2.

^ Mr. Muthumani Doraisamy
for R.3.

: O R D E R :

This writ petition is filed for the issue of writ of certiorarified mandamus to call for the records, dated 25.1.1993 issued in D4/023070/92 and the order of the fourth respondent dated, 14.3.2001 issued in Mu.Mu.No. 22459/W.O.7/2000, dated 14.3.2001 and quash the same and further direct the respondents to fix the petitioner as Physical Director Grade-I, with effect from 3.7.1978 with attendant benefits.

2. The brief facts of the case are as follows: The petitioner was appointed as Physical Director, Grade-II in the year 1976 in Sri Venkateswara High School, Vellore. After the abolition of the Pre-University Course in the colleges, Higher Secondary Cou rse was introduced in the High Schools in the year 1978. By G.O.Ms.2466, dated 19.11.1977, Sri Venkateswara High School was upgraded as Higher

Secondary School. The scale of pay of the posts in the Higher Secondary School was fixed by G.O.Ms.1073, Educ tion Department, dated 6.10.1978. At that time since there was dearth of qualified hands for Higher Secondary courses, B.T. Assistants though not qualified were allowed to handle the Higher Secondary classes. Therefore, the G.O. Provided for two kind of pay scales. As for the Physical Directors, the pay scale for qualified persons was fixed as Rs.600-1050; for unqualified persons, Rs.450-800 plus Special Pay of Rs.25/- was fixed. The petitioner was fully qualified on the date of introduction of Hi her Secondary courses in the school. Therefore, according to the order dated, 9.4.1980 issued in R.C.No.T2/12682/80, the petitioner's pay was fixed as Rs.600-1050 with effect from 3.7.1978. But, he was not paid the amount. Therefore, the petitioner ga e number of representations and reminders. Finally, he was informed that the order dated 9.4.1980 has been cancelled by order dated 25.1.1993. Therefore, this writ petition was filed. During the pendency of the writ petition by another order dated 14 3.2001, the fourth respondent herein rejected his claim. Therefore, the prayer in the writ petition was amended as stated above. 3. Mr.P.Harikrishnan, Assistant Head Master of Sri Venkateswara Higher Secondary School filed an application and got impleaded as third respondent. Thereafter, the Joint Director of School Education (Higher Secondary) was impleaded as the fourth res pondent.

4. First respondent has filed a counter-affidavit stating that it is true that Venkateswara Higher Secondary School was upgraded as Higher Secondary School on 3.7.1978. The Chief Educational Officer allotted 11 teachers for academic subjects for the s chool. The posts for academic subjects were created one by one as per the students' strength. The post of Physical Director, Grade-I was sanctioned only with effect from 20.1.1981 and the scale of pay Rs.600-1050 was granted. Only the Head Master po t and the teachers for academic subjects were sanctioned by G.O. Dated 6.12.1978. The proposal of the school fixing the scale of pay of the petitioner at Rs.600-1050, with effect from 3.7.1978 was not approved by the District Educational Officer who is the competent authority to issue staff grant. The order of the Management was not binding on the educational authorities. The petitioner's post comes under the special category and does not come under the academic course. Physical education is not an cademic subject. Physical Education Teachers handling Higher Secondary Classes were paid special pay of Rs.25/- for that purpose. The qualifications were not taken into account for that and special pay was paid only to Physical Education Teachers in t e school which are not having the Physical Director posts. The petitioner has already been promoted on 20.1.1991 as Physical Director. The petition is liable to be dismissed. 5. In the counter filed by the second respondent, it is stated that, in the order sanctioning the posts for Higher Secondary teachers, the Physical Directors' posts were not sanctioned. Instead, Headmaster was asked to give special allowance of Rs.25/- to the senior Physical Education Teacher. Therefore, Tmt. Anusuya Devi, the seniormost Physical Education Teacher was granted

the special pay. Since no post of Physical Director (High School) was sanctioned, though the petitioner was fully qualified to hold the post of Physical Director (Higher Secondary), the petitioner was not given the post. There was no sanctioned post of Physical Director in the scale of Rs.600-1050 in the school. Only on 20.1.1981, that post was By G.O.Ms.1591 (Education), dated 24.8.1979, sanction was accorded for upgradation of 400 Physical Education Teachers/Physical Directors in the Higher Secondary schools in the scale of pay, Rs.600-1050. But the Governm granted and the petitioner was qu lified for the post on 20.1.1981. nt prescribed educational qualification for Physical Directors by G.O.Ms.1734, dated 30.8.1980. By proceedings dated 2.12.1980, the Director of Physical Education issued instructions that out of 400 posts ordered to be converted into posts of Physical irectors (Higher Secondary), 190 would be utilised in the Government Higher Secondary School and the remaining 210 would be utilised in the Aided and Local Body, Higher Secondary Schools. By proceedings dated 20.1.1981, the District Educational Officer, Vellore intimated the sanction of the post as per the directions of the Director of School Education dated 2.12.1981. The petitioner submitted representation stating that as per G.O.Ms.1073, Finance (Pay Commission) Department, dated 6.10.1978, his pay had to be fixed in the scale of Rs.600-1050 with effect from 1978 itself. This was also recommended by Head Master. But, then, the post of Physical Director in this school was not upgraded. This fact was not brought to the notice of the administrator. The second respondent passed an order fixing the pay of the petitioner in the scale of pay of Rs.600-1050 with effect from 3.7.1978. When the mistake was realised, the second respondent's order dated 9.4.1980 was cancelled on 15.5.1981. The petition r has been receiving the salary in the upgraded post only from 20.1.1981. He never complained against that. The petitioner submitted a presentation ;on 1.6.1992 for fixing his pay in the scale with effect from 3.7.1978. By proceedings dated 25.1.1993, the petitioner was informed that his request could not be granted as the matter was already settled. Now the petitioner filed this writ petition. The writ petition is belated and it has to be dismissed on the ground of laches alone. Petitioner was no paid special pay of Rs.25/- before the post was sanctioned. 6. The third respondent in his affidavit has stated that the petitioner filed his writ petition not only for revising is scale of pay, but also for fixing it with retrospective effect, claiming seniority for the post of Head Master. The writ petitioner has acted as Physical Director only from 20.1.1981. So the third respondent is concerned only about fixing the seniority of the petitioner.

7. From the above statements, it is clear that the petitioner was in possession of P.G. Degree even when he joined the services of the second respondent's school. Later in 1978, the school was upgraded as Higher Secondary School. The posts that were n ecessary for handling the Higher Secondary School were upgraded, physical education was also one of the subjects in the Higher Secondary System. The learned senior counsel, Mr. K.Chandru submitted that sanction of a new post

is different from upgradi g of the existing post. In so far as the upgradation of the existing post is concerned, the doctrine of "Flexible Concept" has to be followed and when the post was upgraded on any subsequent dates, it would be deemed to have been upgraded from the date of introduction of Higher Secondary Course in the year 1978. So viewed, the post should have been treated as upgraded with effect from 1978 itself and since the petitioner was the only qualified person having the degree in the physical education in the year 1978, the petitioner should have been fixed in that post in the deemed upgraded post. Therefore, he should have paid salary of the upgraded post from 1978 onwards. 8. Learned counsel for the second respondent submitted that when the school was upgraded as Higher Secondary School in the year 1978, all the posts that were necessary for Higher Secondary School were not sanctioned. The posts were sanctioned, on diff erent dates. In August, 1979, 400 posts of Physical Directors were sanctioned. But, it was for the entire State of Tamil Nadu. Mere sanctioning of the posts for the whole of State does not confer any right to this petitioner to be appointed to one of such posts; unless and until a post was sanctioned in the second respondent school, the second respondent cannot appoint any person for that post. The post of Physical Director was sanctioned to this second respondent school only in the year 1981. Ther fore, the second respondent cannot appoint this writ petitioner in that post from the year 1978 when there was no such sanctioned post. Therefore, the proceedings issued to him fixing his scale as Rs.600-1050 was a mistake, without understanding the co tents of the G.Os. Therefore, that was cancelled subsequently in the year 15.5.1981 itself. Against that, the petitioner did not raise any objection and therefore, such objection cannot be raised now. 9. Learned Government Pleader appearing for the first respondent submitted that unless a post was sanctioned, no person would be entitled for that pay, because no grants would be paid for that post by the State. Therefore, the petitioner was not entitle d to the pay, the salary of the Physical Director (Higher Secondary) from the year 1978, nor he can be appointed as such in a post on a date when there were no such post existed.

10. The prayer in the writ petition is to quash the order dated 14.3.2001. This order has been passed on the representation made by the petitioner on 19.2.2000. As seen from the affidavit of the petitioner as well as counter-affidavit of the second res pondent, the original order fixing the scale of pay at Rs.600-1050 in the year 1980 was cancelled as early as 5.1.1981. There was no representation immediately thereafter. Thereafter, he was appointed as Physical Director (Higher Secondary) with effect from 20.1.1981. Subsequent to the appointment, he has never made any representation or appeal against those orders. After the lapse of almost nine years, this representation has been made. So on the ground of delay alone, this representation was liable to be rejected. In spite of that, the fourth respondent passed a detailed order stating that when there was no sanctioned post in the year 1978, th petitioner cannot claim to hold that post merely on the basis that High School was upgraded as

Higher Secondary School from the year 1978. There is nothing illegal in this and it cannot be set aside. Hence, the writ petition is liable to be dismissed in so far as it relates to the quashing of this order. 11. The other prayer is to direct the respondent to fix the petitioner in the scale of pay, Rs.600-1050 from 3.7.1978 with all attendant benefits. For the reasons stated above, his appointment as Physical Director, Grade-I (Higher Secondary) by the resp ondent was cancelled in the year 1981 itself. Therefore, since the petitioner did not raise any objection for that, it cannot be granted at the delayed stage. 12. Further, from the typed set filed along with the counter by the second respondent, it is clear that 400 posts of Physical Directors in the Higher Secondary School by G.O. Dated 24.8.1979 were upgraded. The said G.O. Specifically provides, " The Director of School Education is authorised to identify and to convert the posts according to availability of qualified persons in the Schools. "

This G.O., was passed on the recommendation of the Director of School Education to upgrade the post for the Higher Secondary School during 1979-80. This recommendation was accepted by the G.O. After accepting the G.O., the Director of School Education as authorised as stated above. Therefore, prior to August 1979, no post of Physical Director (Higher Secondary) existed in Tamil Nadu prior to 24.8.1979. Even this G.O., only sanctioned 400 posts, but it was yet to be identified and allotted by the Dir ctor of School Education to various schools. By another G.O., dated 30.8.1980, the qualifications prescribed for this Physical Director was also modified. Equivalent diploma was deleted by the subsequent G.O. Only by R.C.19769/D/80, dated 20.1.1981, t e post of Physical Director in the second respondent school was upgraded. The proceedings reads as follows:

"As per the directions of the Director of School Education in the above cited reference, it is stated that the Physical Directors working in the secondary stage (i.e., High School Stage) under your the same institution with effect from 20.1.1981 as per the Government Orders. " management are upgraded as Physical Directors (Higher Se condary)

13. A reading of this would make it clear that the post of Physical Director (Higher Secondary) was sanctioned only from 1981 and the grant was also given from the year 1981. Inasmuch as there was no post of Physical Director (Higher Secondary) in the ye ar 1978 in the entire Tamil Nadu and the fact that the post of Physical Director (Higher Secondary) was sanctioned to the second respondent school only from 1981, the petitioner's claim that he shall be paid salary from the year 1978 in the upgraded post cannot be sustained. Therefore, the second prayer in the writ petition is also dismissed. 14. In the result, the writ petition is dismissed. In the circumstances, no costs.

7-2-2002.

Index: Yes/No
vs

To:

1. The District Educational
Officer, Vellore,
N.A. District

2. The Executive Officer,
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